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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1816

METHODIST HOSPITAL OF KENTUCKY, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD
and
COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION ON BEHALF OF COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, 17-38) is reported at ____ F.2d ____, 88 LC ¶11,971, and 103 LRRM 2875. That opinion was amended. (Pet. A, 34-35). The decisions and orders of the National Labor Relations Board and the administrative law judge (Pet. App. B, 36-102) are reported at 221 NLRB 692 and 227 NLRB 1392.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 1980. The petition for writ of certiorari was filed on May 16, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether an employer may refuse to consider the employment applications of former striking employees on grounds of strike misconduct without identifying the applicants as having engaged in such misconduct.

STATEMENT OF THE CASE

The National Labor Relations Board found that petitioner violated Sections 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. §158(a)(1) and (3), by refusing to reinstate or consider for rehire employees who had participated in an economic strike. (Pet. App. B, 42-43). The strike began on June 10, 1972, and ended on October 10, 1974. Although petitioner was not covered by the Act at the beginning of the strike, the 1974 Health Care Amendments, 29 U.S.C. §152(2) and (14), brought it within the Act on August 24, 1974. (Pet. App. A, 17-18).

Petitioner refused to consider the post-strike employment application of any striker because of strike-related violence by unidentified individuals. (Pet. App. B, 52, 71). Although petitioner based its refusal to rehire strikers on the violence that occurred during the strike, it presented no evidence that any specific individual was guilty of violence or misconduct related to the strike. (Pet. App. A, 22-23; Pet. App. B, 60 n. 12, 71).

The court of appeals found, contrary to the Board, that petitioner had discharged the strikers before it came

under the Act and therefore had no obligation to offer strikers reinstatement to their former positions. (Pet. App. A, 25-31). However, the court agreed with the Board that petitioner had committed an unfair labor practice by categorically refusing to consider the applications of strikers for rehire as new employees. (Pet. App. A, 31-32). The court enforced the Board's order insofar as it concerned petitioner's refusal to consider the employment applications of strikers. (Pet. App. A, 32-33). This order required petitioner to cease and desist from its unfair labor practices, and, affirmatively, to make whole and offer employment to named persons who had been strikers. (Pet. App. B, 44-45, 74-76).

ARGUMENT

As the court of appeals noted (Pet. App. A, 31-32), this case is controlled by *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 181-85 (1941). Petitioner cannot refuse to rehire former employees because of their participation in protected activities. *Woodlawn Hospital v. NLRB*, 596 F.2d 1330, 1337 (7th Cir. 1979) (dictum).

Petitioner maintains that there is a conflict among circuits over whether an employer can refuse employment to a striker because of strike-related violence without showing that the particular striker was actually guilty of violence. Petitioner argues that, contrary to the decision in this case, the Fourth and Fifth Circuits would not require an employer to prove a particular individual participated in unprotected activity before discriminating against that individual. (Pet. 11-13).

There is, however, no conflict among the circuits on this question. It is a well established rule that before an employer can refuse reinstatement of a striker for strike misconduct, the employer must show that the striker was actually guilty of the misconduct. This rule is followed by

the U. S. courts of appeals, *e.g.*, *Mosher Steel Co. v. NLRB*, 568 F.2d 436, 441 (5th Cir. 1978); *Advance Industries Div.—Overhead Door Corp. v. NLRB*, 540 F.2d 878, 883 (7th Cir. 1976); *NLRB v. Sea-Land Service, Inc.*, 356 F.2d 955, 966-67 (1st Cir.), *cert. denied*, 385 U.S. 900 (1966), as well as by the National Labor Relations Board, *Markle Manufacturing Co.*, 239 NLRB No. 168 (1979).

In its petition to this Court and in the court of appeals, petitioner has relied on the Fifth Circuit decision in *Johns-Manville Products Corp. v. NLRB*, 557 F.2d 1126 (1977), *cert. denied*, 436 U.S. 956 (1978). In *Johns-Manville*, the court simply held that when employees engaged in an in-plant strike their jobs could be given to permanent replacements, just as in any other strike. 557 F.2d at 1133. At the same time, the court pointed out that while it was permissible to replace striking employees, it would be unlawful to discriminate against strikers by refusing to rehire them. 557 F.2d at 1133 n. 16.

In *NLRB v. Big Three Industrial Gas & Equipment Co.*, the Fifth Circuit emphasized that *Johns-Manville* applied only to replacement of in-plant strikers. 579 F.2d 304, 314 (1978), *cert. denied*, 440 U.S. 960 (1979). Speaking of post-strike sanctions, such as those imposed by petitioner in this case, the Court said, "Clearly, an employer punishing past wrongs must separate the guilty from the innocent". 579 F.2d at 314 n. 11. Petitioner has refused to make such a distinction.

The Fifth Circuit considered an employer's refusal to rehire certain strikers following incidents of misconduct during a strike in *NLRB v. Moore Business Forms, Inc.*, 574 F.2d 835 (1978). The court held that striking employees must be directly identified with misconduct if they are to be denied reemployment on that basis. 57[illegible]

F.2d at 843. Cited in support of this proposition was *NLRB v. Cambria Clay Products Co.*, 215 F.2d 48 (6th Cir. 1954), a Sixth Circuit decision cited by the Board in this case (Pet. App. B, 71 n. 21 and 22).

Petitioner also relies on *A. S. Abell Co. v. NLRB*, 598 F.2d 876 (4th Cir. 1979). In that case, an employer declined employment to a pressman who was a participant in the Washington Post strike until it could determine whether the pressman had participated in violence that occurred in that strike. The employee was not absolutely denied employment; hiring was simply delayed while the employer determined his participation, if any, in strike-related violence against his previous employer. 598 F.2d at 879. By contrast, petitioner has refused to determine whether any of the rejected applicants in this case had engaged in strike misconduct, preferring to deny them all employment simply because of their participation in the strike.

As the above discussion makes clear, it is an established rule under the National Labor Relations Act that an employee cannot be punished for strike misconduct without evidence that he actually engaged in misconduct. In this case, petitioner discriminated against past employees because of their participation in a strike without showing that any of them engaged in strike misconduct. This discrimination because of participation in protected union activity was properly held to be a violation of Sections 8(a)(1) and (3) of the Act. 29 U.S.C. §158(a)(1) and (3).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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